7

Trust Land

Introduction .... [7.10]
Key concepts .... [7.10]
Key Legislation .... [7.10]
Trust land under Land Act 1994 .... [7.20]
Reserves .... [7.30]
Changing boundaries .... [7.31]
Changing community purpose .... [7.32]
Applying for dedication or adjustment .... [7.33]
Procedure .... [7.34]
Location .... [7.40]
Nature of a reserve .... [7.50]
Reserve under Land Act 1994 .... [7.60]
May not include land "set apart" for purpose .... [7.61]
Determining what land should be dedicated .... [7.70]
Evaluation of land .... [7.80]
"Dedication" of unallocated State land .... [7.90]
Dedication of land to public use .... [7.100]
Dedication of land for a community purpose .... [7.110]
Reserve land may be declared an area for another purpose under statutory authority [7.120]
Nature Conservation Act 1992 .... [7.130]
A reference to a Land Act reserve may include a forest reserve .... [7.140]
Recreation Areas Management Act 2006 .... [7.150]
Brisbane Forest Park 1977 .... [7.160]
Marine Parks Act 2004 .... [7.170]
Forestry Act 1959 .... [7.180]
"Reserve" not always a reserve under Land Act 1994 .... [7.190]
No adverse possession .... [7.200]
"Community purposes" .... [7.210]
Register of reserves & trustees of trust land .... [7.220]
Conducting a search .... [7.230]
Altering boundaries & purpose of reserve .... [7.240]
Public's right of access .... [7.250]
Public thoroughfare easement .... [7.251]
"Owner" of land in reserve .... [7.260]
Reserves and Local Government Act 1993 .... [7.270]
Ownership of improvements .... [7.280]
No necessity for reservations to the State .... [7.290]
Interest of trustee in a reserve .... [7.291]
Reserve land as rateable land .... [7.300]
Fencing land in a reserve .... [7.310]
Easements over a reserve .... [7.320]
Power of attorney in easement burdening land .... [7.321]
Reserves & native title .... [7.330]
Common law .... [7.340]

Native Title Acts ... [7.350]
Past & intermediate period acts ... [7.351]
Future acts ... [7.352]
Reserves under Aboriginal Land Act 1991 & Torres Strait Islander Land Act 1991 ... [7.360]

Reserves under Acts other than Land Act 1994 ... [7.370]
Commonwealth reserves ... [7.380]

Revoking a reserve ... [7.390]
Reserve no longer required for community purpose ... [7.400]
Public interest ... [7.410]
More appropriate tenure ... [7.420]
Urban development area ... [7.421]
Process for revocation ... [7.422]
Chief executive's caveat ... [7.423]
Effect of revocation ... [7.430]
State leases & easements over reserve ... [7.440]
Improvements ... [7.450]

Issuing of deed of grant over operational reserve ... [7.451]
Effect of revocation of operational reserve ... [7.452]
Chief executive's caveat ... [7.453]

State leases over reserves ... [7.460]
Conditions permitted and prohibited ... [7.470]
When leases granted ... [7.480]
Protected areas ... [7.490]
Consistent with purpose for which land reserved ... [7.500]
Facilitate to enhance purpose for which land reserved ... [7.510]
Diminish the purpose for which reserve dedicated ... [7.520]
Examples of operation of s 32(3), (4) Land Act 1994 ... [7.530]
"Improvements" ... [7.540]
Obtaining a State lease ... [7.550]
State lease vs trustee lease ... [7.560]

Dedication of Land Act reserve as forest reserve (Nature Conservation Act 1992) ... [7.570]
Reference to Land Act reserve may include forest reserve ... [7.580]

Reserves & mining interests ... [7.590]
Parcel prospecting permit ... [7.600]
Mining claim ... [7.610]
Exploration permit ... [7.620]
Mineral development licence ... [7.630]
Mining lease ... [7.640]

Development on land in a reserve ... [7.650]
State's consent & evidence required ... [7.660]
Owner of reserve land for purposes of Integrated Planning Act 1997 ... [7.670]
Facilities on reserve land as community infrastructure ... [7.680]

Other matters relating to reserves ... [7.690]
Quarry material & forest products ... [7.700]
State-controlled roads through reserve ... [7.710]
Vegetation Management Act 1999 ... [7.720]

Botanic gardens, Brisbane ... [7.730]

Deeds of grant in trust ... [7.740]
Fee simple estate on trust under an Act not necessarily a DOGIT ... [7.750]
Reservations to the State in a DOGIT ... [7.760]

DOGIT special type of fee simple estate .... [7.770]
Inconsistent use .... [7.780]
Deed of grant in trust & native title .... [7.790]
Common law .... [7.800]
Native Title Acts .... [7.810]
Past, intermediate period & previous exclusive possession acts .... [7.812]
Future acts .... [7.814]
DOGIT land under Aboriginal Land Act 1991 or Torres Strait Islander Land Act 1991 . [7.820]
Cancelling deed of grant in trust .... [7.830]
Effect of cancellation .... [7.840]
Unlawful occupation of land .... [7.841]
Improvements .... [7.842]
Surrendering deed of grant in trust .... [7.843]
Deeds of grant in trust for Aborigines & Torres Strait Islanders .... [7.850]
Exclusions .... [7.860]
Section 452A of Land Act 1994 .... [7.870]
Aboriginal Land Act 1991 & Torres Strait Islander Land Act 1991 .... [7.880]
Development on land in deed of grant in trust .... [7.890]
State's consent &evidence required .... [7.900]
Facilities on land in a deed of grant in trust as community infrastructure .... [7.910]
Other matters relating to deeds of grant in trust .... [7.920]
Resumption of a DOGIT (Acquisition of Land Act 1967) .... [7.921]
Quarry material and forest products .... [7.930]
Vegetation Management Act 1999 .... [7.940]
Trustees & trusts of trust land .... [7.950]
Trustee .... [7.960]
Legal liability of trustees .... [7.970]
Non-application of Trusts Act 1973 .... [7.980]
Nature of a trust of trust land .... [7.990]
Trustee's administrative functions .... [7.1000]
Manage trust land consistent with achieving purpose of trust .... [7.1010]
Fulfil trust within conditions of appointment .... [7.1020]
Control noxious plants on trust land .... [7.1030]
Books of account .... [7.1040]
Trustee's duty of care .... [7.1050]
Management plans & trust records .... [7.1060]
Management plans .... [7.1070]
Departmental publication .... [7.1080]
General powers of a trustee .... [7.1090]
Nature .... [7.1100]
Judicial review .... [7.1110]
State trustee .... [7.1111]
Model by-laws .... [7.1120]
Land Regulation 1995 .... [7.1130]
Winding-up trusts of trust land .... [7.1140]
Sale of trust assets .... [7.1150]
Special provisions relating to trustees of trust land for cemetery purposes .... [7.1160]
Exhumations .... [7.1170]
Vacation & removal of trustee .... [7.1180]
Removal of trustee who is a water entity .... [7.1181]
Other matters relating to trustees .... [7.1190]

Trust land may be registered place (Queensland Heritage Act 1992) [7.1200]
Delegation of Minister's & chief executive's powers to local government [7.1210]
Compulsory acquisition of land for community purpose [7.1220]

Dealings in trust land [7.1230]
No disposal [7.1240]
Surrender [7.1250]
Effect [7.1251]
Improvements [7.1252]

Leasing – the trustee lease [7.1260]
Terms of trustee lease [7.1270]
Nature of trustee's leasing power [7.1280]
No estoppel against trustee in absence of Minister's approval [7.1290]
Occupation of trust land without trustee lease or sublease (or trustee permit) [7.1300]
Nature of "trustee lease" [7.1310]
Entering into agreement for trustee lease [7.1320]
Minister's approval [7.1330]
"In principle" approval [7.1340]
Estoppel against Minister [7.1350]
What the Minister must approve [7.1360]
Approval of "trustee lease" & exercise of Minister's discretion [7.1370]
No appeal against decision [7.1380]
Construction trustee leases [7.1381]
General authority to lease [7.1390]
When trustee lease takes effect [7.1400]
Holding over under trustee lease [7.1410]
Practice – trustee lease [7.1420]
Minister's usual requirements [7.1430]
Revocation of reserve or cancellation or surrender of DOGIT [7.1440]
Revocation of reserve [7.1441]
Cancellation or surrender of DOGIT [7.1442]
Dealings in trustee lease [7.1450]
Subleasing of construction trustee lease [7.1451]
Lessee may appeal against Minister's decision [7.1460]
Transfer [7.1470]
Sublease [7.1480]
Mortgage [7.1490]
Basis of Ministerial approval to a trustee lease [7.1500]
Use inconsistent with community purpose [7.1502]
Rent under trustee lease [7.1510]
Amendment of trustee lease [7.1520]
A trustee lease & reconfiguration of a lot under Integrated Planning Act 1997 [7.1530]
Cancelling trustee lease [7.1540]
By trustee [7.1550]
By Minister [7.1560]
Effect [7.1570]
Removing improvements on cancellation [7.1580]
Other matters relating to trustee leases [7.1590]
Department of Natural Resources and Water policy [7.1600]

Trustee permits [7.1610]
"Not be inconsistent with the community purpose" [7.1620]
Trustee permit guidelines [7.1630]

Terms & conditions .... [7.1640]
Mandatory standard terms document .... [7.1641]
Rent .... [7.1650]
Form & registration .... [7.1660]
No dealings in trustee permit .... [7.1670]
Cancellation .... [7.1680]
By trustee .... [7.1690]
By Minister .... [7.1700]
Notice of intention to cancel .... [7.1710]
Effect of cancellation .... [7.1720]
Removing improvements on cancellation .... [7.1730]
Revocation of reserve or cancellation or surrender of DOGIT .... [7.1740]
Reserve .... [7.1741]
DOGIT .... [7.1750]
Mortgaging a deed of grant in trust .... [7.1760]
Application of Property Law Act 1974 .... [7.1770]
Powers of mortgagee on default .... [7.1780]
Power of sale .... [7.1781]
Other dealings .... [7.1790]
Easement .... [7.1800]
No statutory covenant .... [7.1810]
No profit a prendre .... [7.1820]
No community titles scheme or building management statement .... [7.1830]

Introduction

[7.10] Governments in Australia have long recognised that there are particular parcels of land that should not be alienated from the State. Instead it is thought those parcels should be set aside and used for community or public purposes (eg parks, sport and recreation, showgrounds, environmental purposes, Aboriginal and Torres Strait Islander purposes, public halls, cemeteries). In Queensland, this community or public purpose land – today generally known as trust land – may be a reserve or a deed of grant in trust (DOGIT).

The LA authorises the Minister administering that Act to dedicate unallocated State land to be a reserve for a community purpose. A trustee may be appointed to manage the land subject to the provisions of the LA. Also, the Governor in Council may grant unallocated State land in trust for a community purpose. The registered owner of such land must also manage the land as a trustee subject to the LA.

Acts other than the LA may also authorise the creation of reserves or authorise the dedication or setting apart of land for specific purposes (eg as State forests and timber reserves under the *Forestry Act 1959,*[1] or as national parks under the *Nature Conservation Act 1992).*[2]

Notes

1 See Ch 9.

2 See Ch 8.

Key concepts

Key concepts in this chapter are summarised below.

- *Importance of community purpose land*: Trust land, that is, reserves and deeds of grant in trust, is created for the benefit of the community. Trust land may be created for purposes such as parks, sport and recreation, showgrounds, environmental purposes and cemeteries.
- *Trust land must be managed responsibly*: Qualified persons known as trustees are usually appointed to manage trust land consistently with the community purpose.
- *Only appropriate interests may be created in respect of trust land*: To preserve the integrity of the trust land, only interests that are not inconsistent with the community purpose may be created in respect of trust land.

Key Legislation

Key legislation regarding the topic of this chapter is set out below.

- *Land Act 1994* **(LA)**

Trust land under Land Act 1994

[7.20] The LA authorises the creation of trust land (that is, reserves and DOGITs (sch 6 LA definition of "trust land")) for the benefit of the community. Section 30 of the LA provides that it is the object of ch 3, pt 1 of the LA (Reserves and Deeds of Grant in Trust) to:

(a) enable unallocated State land to be dedicated as a reserve or granted in fee simple in trust for community purposes; and

(b) ensure that reserves and land granted in trust are properly and effectively managed:

(i) by persons (the **"**trustees**"**) who have some particular association or expertise with the reserve or land and its purpose or with the local community; and

(ii) in a way that is consistent with the purpose for which the reserve was dedicated or the land was granted in trust; and

(c) ensure that the community purpose for which the reserve was dedicated or the land was granted in trust is not diminished by granting inappropriate interests over the reserve or land granted in trust.

Section 30 is an extension of s 4 of the LA (Object of this Act). Section 4 provides, in part:

> In the administration of this Act, land to which this Act applies must be managed for the benefit of the people of Queensland by having regard to the following principle … –
>
> **Community purpose**
>
> - if land is needed for community purposes, the retention of the land for the community in a way that protects and facilitates the community purpose …

Related topics: Object of the *Land Act 1994* (ch 2); Trustees and trusts of trust land (at [7.950]-[7.1180]); Dealings in trust land (at [7.1230]-[7.1830])

Reserves

[7.30] The Minister administering the LA may dedicate unallocated State land[1] as a reserve for one or more community purposes (s 31(1) LA).[2] Land is dedicated as a reserve by registering a dedication notice (which, for registration purposes, is annexed to a Form 14) or plan of subdivision for the reserve (s 31(3) LA).[3] The dedication of a reserve takes effect on the day the dedication notice or plan of subdivision is registered (s 31(7) LA).[4] A dedication notice will be used where the unallocated State land to be dedicated is identified by a "lot on plan" description (that is, it is surveyed) and the whole of that lot is to be dedicated. A plan of subdivision will be used where part of a lot of unallocated State land is to be dedicated or where the unallocated State land was previously unsurveyed.

A person may apply to the Minister for the dedication of a reserve (s 31C LA).[5]

Before dedicating unallocated State land as a reserve the Minister must follow the procedure in ss 31D and 31E of the LA and, once the land is dedicated, s 31F must be followed.[6]

General note – Requirements for a dedication notice and plan of subdivision: A dedication notice or plan of subdivision must state the community purpose for which the unallocated State land is dedicated as a reserve (s 31(5) LA). A dedication notice must also state the description of the land dedicated as a reserve (s 31(6) LA).

A dedication notice contained in a Form 20 (and which is annexed to a Form 14 for lodgement purposes) will state the name of a trustee appointed for the reserve and any conditions of appointment and if any public utility easement is to continue as an interest in the land (s 372(6) LA).

A plan of subdivision must be accompanied by a "statement of intent" (plan lodgement under the LA) which is contained in a Form 20. That statement of intent will state the name of a trustee appointed for the reserve and any conditions of appointment and if any public utility easement is to continue as an interest in the land (s 372(6) LA).

Changing boundaries

[7.31] The Minister, by registering an adjustment notice (which, for registration purposes, is contained in a Form 20 and annexed to a Form 14) or a plan of subdivision, may change the boundaries of a reserve (s 31A(1), (3) LA).[7] The change takes effect on the day the adjustment notice or plan of subdivision is registered (s 31A(5) LA). An adjustment notice will be appropriate where the proposed boundaries of the reserve have already been surveyed.

A trustee of a reserve may apply to change the boundaries of a reserve (s 31C(a) LA).[8]

Before changing the boundaries of a reserve the Minister must follow the procedure in s 31D and 31E of the LA and, once the boundaries have been changed, s 31F must be followed.[9]

> **General note – Requirements for an adjustment notice and plan of subdivision:** An adjustment notice must state the reason for the change of the boundaries of the reserve and the amended description of the land dedicated as the reserve (s 31A(4) LA). The notice will need to insert the new description of the reserve (at Item 4).
>
> For a plan of subdivision, a "statement of intent" (plan lodgement in a Form 20) must be completed. The new description of the reserve will need to be included in the statement of intent.

Changing community purpose

[7.32] The Minister, by registering an adjustment notice (which, for registration purposes, is contained in a Form 20 and annexed to a Form 14), may change the community purpose for which a reserve is dedicated (s 31B(1), (5) LA).[10] The change takes effect on the day the adjustment notice is registered (s 31B(7) LA).

A trustee of a reserve may apply to change the community purpose of a reserve (s 31C(b) LA).[11]

Before changing the community purpose of a reserve the Minister must follow the procedure in s 31D and s 31E of the LA and, once the community purpose has been changed, s 31F must be followed.[12]

> **General note – Requirements for an adjustment notice:** An adjustment notice must state the reason for the change of community purpose of the reserve and the changed community purpose for which the reserve is dedicated (s 31B(6) LA). The notice will insert the new community purpose (at Item 5).

Applying for dedication or adjustment

[7.33] Any person may apply to the Minister for the dedication of a reserve and the trustee of a reserve may apply:

(a) to change the boundaries of the reserve; or

(b) to change the purpose for which the reserve is dedicated (s 31C LA).

A person who applies to the Minister for the dedication of a reserve will usually be the person who intends to be the trustee of the reserve (eg a local incorporated body may apply for an area of unallocated State land to be dedicated as a reserve for historical purposes and that body may be appointed to be the trustee of the reserve).

The Minister may dedicate unallocated State land as a reserve or change the boundaries or community purpose of a reserve without receiving an application from a person or trustee under s 31C (see ss 31(3), 31A(2), 31B(4) LA).

> **Practice note – Making an application:** There is no prescribed form for making an application under s 31C of the LA. An application may be made by letter addressed to the relevant regional office of the administering department for the LA.

Procedure

[7.34] Before dedicating unallocated State land as a reserve or changing the boundaries or community purpose of an existing reserve, the Minister must follow the procedures in s 31D and 31E of the LA.

Practice note – Proposal for a dedication of a reserve: If the Minister proposes to dedicate unallocated State land as a reserve, written notice of the proposal must be given to the following:

(a) the proposed trustee of the reserve;

(b) a person who made an application under s 31C other than the proposed trustee (see [7.33]);

(c) each person with a registered interest in the unallocated State land over which the reserve is proposed to be dedicated (this would be limited to a public utility provider under a public utility easement or the holder of a mining interest);[13]

(d) another person the Minister considers should be given notice (s 31D(1) LA).

Proposal to change the boundaries of a reserve: If the Minister proposes to change the boundaries of a reserve, written notice of the proposal must be given to the following:

(a) the trustee of the reserve (if there is a trustee);

(b) a person who made an application under s 31C other than the trustee (see [7.33]);

(c) each person with a registered interest in the reserve (eg a lessee under a trustee lease);

(d) another person the Minister considers should be given the notice (s 31D(2) LA).

Proposal to change the community purpose of a reserve: If the Minister proposes to change the community purpose of a reserve, written notice of the proposal must be given to the following:

(a) the trustee of the reserve;

(b) a person who made an application under s 31C, other than the trustee (see [7.33]);

(c) each person with a registered interest in the reserve (eg a lessee under a trustee lease);

(d) another person the Minister considers should be given the notice (s 31D(3) LA).

The notice: The Minister's written notice must:

(a) be in the approved form (the notice may be in letter form); and

(b) state the following:

  (i) the reason for the proposal;

  (ii) that the person given the notice may make a submission against the proposal to the Minister;

  (iii) that the submission must be made in the approved form;

  (iv) the closing day for the submission;

  (v) the place where or the way the submission must be lodged (s 31D(4) LA).

Submissions: A person given a notice (as provided for above), other than a person who applied for the dedication or adjustment of the reserve, may make a submission against the proposal to the Minister.[14] The submission must:

(a) be made in the approved form (a letter will suffice);

(b) be received by the closing day for the submission in the notice; and

(c) be lodged at the place or in the way stated in the notice.

The Minister must consider all submissions received before dedicating, changing the boundaries of, or changing the purpose for, the reserve (s 31E LA).

Notice of registration of action in relation to reserve: Written notice of the registration of a dedication of a reserve, change in the boundaries of a reserve or change in the community purpose of a reserve must be given to each person given a notice under s 31D. The notice must include the date of registration of the action. If an action is not registered, written notice of the fact must be given to each person about the proposed action (s 31F LA).

Practice note – Dedicating a reserve by plan of subdivision or dedication notice under s 31 of the LA: A plan of subdivision is necessary to dedicate land as a reserve if the proposed reserve:

- is currently part of another lot;

- is currently the whole of a lot but part of a lease or another reserve or a title for unallocated State land and the description of the balance of the lease or other reserve or title for unallocated State land is to be amended (eg part of the balance of the lease or other reserve or title for unallocated State land is to be dedicated as road); or
- needs to be surveyed before it may be dedicated (eg the land is described by an Administrative Plan).

The plan must be accompanied by a statement of intent (in a Form 20) (select section 31).

A dedication notice is necessary to dedicate land as a reserve if the land:

(a) is unallocated State land; and

(b) does not need to be surveyed before it may be dedicated.

Practice note – Changing the boundaries of a reserve under s 31A of the LA: A change of boundaries of a reserve applies to the inclusion of unallocated State land in the reserve or a change of the boundaries as a result of a resurvey of the land or due to erosion or accretion. A plan of subdivision is necessary if:

- land is to be amalgamated with the land in the reserve;
- the boundaries of the reserve require re-survey; or
- the boundaries of the reserve have changed due to erosion or accretion.

An adjustment notice is required to change the boundaries of a reserve if a lot is being added to the reserve (eg a parcel of unallocated State Land (Lot 1) is being added to the reserve (Lot 2)). On registration of the adjustment notice, the reserve will be described as Lots 1 and 2.

Notes

1 As to unallocated State land see [3.90].

2 However, the Minister may dedicate unallocated State land as a reserve for a community purpose that is the provision of services beneficial to Aboriginal people or Torres Strait Islanders particularly concerned with land only if the unallocated State land is transferable land under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*, as the case may be (s 31(2) LA). As to transferable land under the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* see Ch 29.

3 Before the commencement of the *Land and Other Legislation Amendment Act 2007* on 1 January 2008, the Minister could dedicate unallocated State land as a reserve by gazette notice (known as a “Reserve and Set Apart Notice”).

4 A reserve created under s 31 of the LA is not a reservation (in a grant) as referred to in s 21 of the LA.

5 See [7.33].

6 See [7.34].

7 However, the Minister may not change the boundaries of a reserve dedicated for a community purpose mentioned in s 31(2) of the LA (s 31A(1)). See above.

8 See [7.33].

9 See [7.34].

10 However, the Minister may change the community purpose for which a reserve is dedicated to a purpose mentioned in s 31(2) of the LA only if the reserve is transferable land (s 31B(2) LA). Also, the Minister may change the community purpose of a reserve dedicated for a purpose mentioned in s 31(2) only to Aboriginal purposes or Torres Strait Islander purposes (s 31B(3) LA). See above.

11 See [7.33].

12 See [7.34].

13 It cannot refer to the holder of an interest in land that will be unallocated State land once the interest is extinguished.

14 Apparently, a proposal in favour of the proposal cannot be made.

Location

[7.40] Unallocated State land that may be dedicated as a reserve includes land below high-water mark (eg a reserve may be created for a jetty or a public boat ramp). A reserve may also be created in strata, whether above or below the surface of land.[1]

Related topics: Unallocated State land (at [3.90]); Dedication of unallocated State land as a reserve (at [7.90]); Community purposes (at [7.210]); High-water mark (at [17.320])

Notes

1 Section 12 of the *Anzac Square Development Project Act 1982* provided that, for the purposes of that Act, the power under the *Land Act 1962* to reserve and set apart any Crown land for a public purpose was to be construed to include the power to reserve and set apart Crown land in strata or layers above or below the surface of land.

Nature of a reserve

[7.50] The primary authority in Australia on the nature of a (public) reserve is *Randwick Corporation v Rutledge* (1959) 102 CLR 54. The leading judgment in that case was delivered by Windeyer J (with whom Dixon CJ, Fullagar and Kitto JJ agreed).

The question for decision in *Rutledge* was whether land in the Randwick racecourse was rateable under the *Local Government Act 1919* (NSW). Section 132 of that Act provided that all land in a municipality or shire, whether the property of the Crown or not, was rateable subject to certain exceptions, of which one was land which was vested in the Crown or in a public body or in trustees and was used for a public reserve. The court, in answering the main question, had to determine whether the racecourse was used as a public reserve. It was held that the land, although dedicated, was not dedicated for purposes which made it a public reserve nor was it used for a public reserve. Accordingly, the land was rateable.

According to Windeyer J (at 70), the word "reserve" in Australia gained a special meaning from the history of colonial land settlement:

> The term "public reserve" – and the word "reserve" alone, when not controlled by a definition or a context indicative of a different sense – have come to be used in common parlance in Australia in an imprecise way to describe an unoccupied area of land preserved as an open space or park for public enjoyment, to which the public ordinarily have access as of right.

Windeyer J observed (at 71-72) that the first formal statement in the colony of New South Wales of a general policy of setting waste lands aside for public purposes appeared to have been made in 1825.[1] In 1831, the colonial policy was adopted that all land, except land appropriated for public purposes, was to be disposed of by sale only. From that time, "land reserved from sale" acquired a definite meaning. Under 5 & 6 Vict c 36, *an Act for regulating the sale of waste land belonging to the Crown in the Australian Colonies*, Crown land could be excepted and reserved from sale for public purposes, including roads, places for the recreation and amusement of the inhabitants of any town or village or for any other purpose of public safety, convenience, health or enjoyment. The amending Act, 9 & 10 Vict c 104, spoke of Crown land being "dedicated or set apart". Windeyer J suggested (at 88-89) that on dedication of Crown land, a public trust is created for the purpose for which the dedication was made (at least where the purpose is charitable). Under the LA, a reserve is trust land and there exists a type of special or statutory trust in relation to the land.[2]

Notes

1 Despatch from Earl Bathurst, Secretary of State for the Colonies, to Governor Brisbane (*Historical Records of Australia*, I, XI, at pages 434-444), 1 January 1825.

2 A reserve is not a common. A common was, in England, generally a parcel of land in a feudal manor that was set aside for the use of all landholders and villagers to graze livestock. In New South Wales, a common may exist under the *Commons Management Act 1989* (NSW). Under that Act, a common is generally a parcel of land set aside as a common or for pasturage for the use of the inhabitants of a specified locality. A trust established in respect of a common holds a fee simple estate in respect of the common.

Section 180(2) of the *Land Act 1910* provided that "all commons and commonages heretofore constituted under any Act shall hereafter be deemed to be pasturage reserves under this Act, and deemed to have been so reserved under this section."

Sample Only

(ii) owned the improvements (s 55H(5) LA).

> **Practice note – Dealing with improvements under a trustee lease or trustee permit where the DOGIT has been surrendered:** Parties to a trustee lease or trustee permit should state in the lease or permit who is the owner of improvements for the purposes of s 55H of the LA. This will determine who may apply for the removal of the improvements under s 55H(1).

> **Related topics:** Unallocated State land (at [3.90]); Public utility easement (generally) (at [5.1710])

Notes

1 Section 55H is inappropriately drafted. The intended "end result" of sub-s (3), namely, that the improvements become the property of the State, only occurs if para (a) or (b) applies. But, on one reading of paras (a) and (b), they can only apply if an owner makes an application under sub-s (1). Although para (a) suggests that the Minister may refuse to approve the removal of improvements, if no application is made, when does the Minister make that decision? That raises an issue as to when an owner must apply for the removal of improvements. As sub-s (3) is intended to vest the State with a particular right in property, the section should be clearer as to when that may occur.

Leasing – the trustee lease

[7.1260] A trustee may lease all or part of trust land if the trustee first obtains the Minister's written "in principle" approval, which may include conditions, to the lease or if the trustee holds a general authority to lease (ss 57(1), (2), 64 LA).

A "trustee lease", which is prepared in a Form 7, must be registered in the appropriate register (that is, for a reserve, in the register of reserves and trustees of trust land, and for a DOGIT, the freehold land register) (s 57(3) LA). Prior to registration, the lease must be endorsed with the Minister's approval (s 57(4) LA).

The Minister may only approve a trustee lease if s 59 is satisfied.[1]

> **Related topics:** The nature of a trustee's leasing power (at [7.1280]); The nature of a trustee lease (at [7.1310]); The Minister's "in principle" approval (at [7.1330]); General authority to lease (at [7.1390])

Notes

1 See [7.1360].

Terms of trustee lease

[7.1270] A trustee lease:

- must not be for a term greater than 30 years (s 61(1) LA);[1]
- contains a condition that the trust land may be used for the community purpose for which it was created (s 61(3) LA) – this does not apply, however, to a building permitted to be built on the land (s 61(4) LA); and
- must not contain a covenant, agreement or condition to:
  - o renew the lease;
  - o convert to another form of tenure (including freehold); or
  - o buy the land (s 61(2) LA).2

> **Related topics:** What does the Minister approve? (at [7.1360])

Notes

1 Under s 344(a) of the *Land Act 1962*, a trustee lease could be issued for up to 75 years.
Section 32(1)(e) of the *Trusts Act 1973* does not apply to a trust of trust land (s 90 LA).

Another Act may provide that a trustee lease must not be for a particular term of years. For example, s 48(3) of the *Queensland University of Technology Act 1988* provides that where the Queensland University of Technology is the trustee of a reserve, the term of any trustee lease granted by it must not be for more than 25 years.

Trustee leases for sporting clubs or for charitable purposes will be for a maximum term of 20 years unless otherwise approved by the Minister (Department of Natural Resources and Mines Policy PUX/901/209 Secondary Use of Trust Land).

2 For relevant policy from the Department of Natural Resources and Water, see P209 in the policy guide at p 801 behind the "Miscellaneous" tab.

Nature of trustee's leasing power

[7.1280] Section 57 of the LA is a facultative provision – it is the source of a trustee's power to lease trust land (cf s 343 *Land Act 1962*; *American Dairy Queen Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677). In other words, the section does not cut down an existing common law power of a trustee to lease trust land. Rather it confers the power to lease with the Minister's approval. This would suggest that any agreement entered into by a trustee granting a third party the right to occupy trust land is of no effect if it does not satisfy s 57 (or s 60) (*Queensland Television Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 167).[1]

Despite the application of the *Property Law Act 1974* to land under the LA (s 5(1)(c), (d)(ii) *Property Law Act 1974*), it is submitted a tenancy may not be created in respect of trust land in a manner otherwise than in accordance with s 57. To hold otherwise would be to derogate from the special provisions of the LA dealing with the creation of leases in trust land and to lessen the control of the Act and of the Minister[2] in relation to the creation of interests in trust land (*Shire of Sutherland v James* (1962) 63 SR (NSW) 273; *Roma Town Council v Anderson* [1958] St R Qd 389; and generally *Dorrigo Shire Council v Smith* (1956) 3 LGRA 270; *Hornsby Council v Roads & Traffic Authority of New South Wales* (1997) 41 NSWLR 151; cf *Palmdale Insurance Ltd v Sprenger* [1988] 1 Qd R 414). Further, it should be noted that the *Property Law Act 1974* applies to land under the LA *subject to* the provisions of the LA.[3] Accordingly, it is suggested that, although s 129 of the *Property Law Act 1974* may ordinarily operate in circumstances where a tenancy is not effective (at law) and create a statutory tenancy at will (see *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78), such a provision cannot be applied to recognise a tenancy that is not approved by the Minister (where such an approval is required by the LA). To recognise a tenancy in such circumstances would circumvent the overall control the LA and the Minister are intended to have in respect of the use of trust land. Further, the LA requires a trustee lease to be registered (s 57(3)).[4]

No estoppel against trustee in absence of Minister's approval

[7.1290] In the absence of obtaining the Minister's approval to a trustee lease, a trustee cannot be estopped from denying that an obligation to grant a lease exists (*Czipo-Barna v The Council of the City of Orange* [1999] NSWSC 323; *Fensom v Cootamundra Racecourse Reserve Trust* [2000] NSWSC 1072(‘*Fensom*’). However, in appropriate circumstances, a trustee may be liable in restitution to another where the trustee accepts a benefit provided by the other person in relation to the trust land (including a person who believed he or she was to be granted a lease), for example, in respect of improvements constructed on the trust land (see *Fensom*).

Related topics: The nature of a trustee lease (at [7.1310]); Entering into an agreement for a trustee lease (at [7.1320])

Notes

1 Clearly in the case of a trustee of a reserve there is a difficulty in inferring the trustee has an inherent power to lease as such a trustee is not the owner of the land in the reserve and does not enjoy the ordinary incidents of ownership of an interest in land

2 Note, however, a trustee may, under s 64 of the LA, be given a general authority to lease without the need to obtain the Minister's approval.

3 Section 491 of the *Local Government Act 1993* will apply to the granting of a trustee lease by a local government that is a trustee of trust land. See [32.20].

4 Further, the Minister can not "approve" a s 129 tenancy. The Minister may only approve that which is provided for under the LA. The LA contemplates the registration of a trustee lease in all cases. While an express yearly tenancy could be created that is not a tenancy to which s 129 of the *Property Law Act 1974* applies (*Brisbane City Council v Council Club Inc* (unreported, Court of Appeal, Queensland, 9 May 1995)).

Occupation of trust land without trustee lease or sublease (or trustee permit)

[7.1300] A person who occupies trust land without being entitled so to do under a trustee lease or a trustee permit (under s 60 LA) unlawfully occupies trust land and is guilty of an offence (s 404(1) LA).

Related topics: Unlawful occupation of land (at [26.110])

Nature of "trustee lease"

[7.1310] A trustee lease is not regulated to the same extent a lease granted under s 15 of the LA over unallocated State land or over a reserve is regulated.[1] Section 57 authorises a trustee to lease only if the trustee first obtains the Minister's approval.

Section 61(1) of the LA provides that a trustee lease must not be for more than 30 years. Section 61(2) provides that a trustee lease must not contain a covenant or agreement to renew the lease, to convert it to another form of tenure, or to buy the land. Section 61(3) says that it is a condition of every trustee lease that the lessee holds the lease so that the land may be used for the community purpose for which it was reserved or granted in trust without undue interruption or obstruction. The rent charged under a trustee lease must be the most appropriate rent, having regard to the use and community benefit and purpose of the trustee lease (s 63(2) LA).[2]

Apart from these provisions, a trustee lease is largely unregulated by the LA. This suggests that the word "lease", as a general rule, is intended to carry its ordinary meaning under s 57(1) (see *American Dairy Queen Pty Ltd v Blue Rio* (1981) 147 CLR 677 at 686 per Brennan J). A trustee lease would thus ordinarily operate as a contract and as a demise (see *The Progressive Mailing House Pty Ltd v Tabali* (1985) 157 CLR 17) and confer on a trustee lessee a right to exclusive possession of the relevant part of trust land. However, where a trustee lease is granted by a trustee who has an authority under s 64(1) of the LA, the lease must state that the trustee, as lessor, reserves the right to permit a person or entity other than the lessee to use the land the subject of the lease for a purpose consistent with the community purpose for which the trust land was dedicated or granted in trust but in a way likely to cause as little disruption as practicable to the lessee's use of the land (s 5D *Land Regulation* 1995). According to Department of Natural Resources and Water Policy PUX/901/209 approval by the Minister for a trustee lease should not be given where the lease is substantially exclusive or commercial in nature, or both. Section 61(3) of the LA, as stated, provides that it is a condition of every trustee lease that the lessee holds the lease so that the land may be used for the community purpose for which it was reserved or granted in trust without undue interruption or obstruction: however, the condition does not apply to a building permitted to be built on the land (s 61(4) LA).[3] These matters do not, of themselves, suggest that a trustee lease cannot confer a right to exclusive possession on the lessee. Rather, they suggest that it is of paramount importance that trust land be used in a manner consistent with the purpose for which it was created. If the trustee lease is consistent with that purpose then the trust land is likely to be able to be used for the community purpose without undue interruption or obstruction. A trustee lease for a secondary purpose may interrupt or obstruct the ability to use

the trust land for its designated community purpose (however, that will depend on the particular community purpose and the actual use made of the land). A reservation for a trustee to permit another person or entity to use the leased land does not mean the trustee lessee cannot enjoy a right to exclusive possession (*Whangarei Harbour Board v Nelson* [1930] NZLR 554).[4] The right is, however, qualified. The trustee must "permit" others to use the land. The lessee may, unless a person or entity holds a permission from the trustee (whether general or specific),[5] exclude intruders from the leased land. (A trustee that permitted others to use the leased land in a way that unduly disrupted the lessee's use of the land, that is, goes beyond what is contemplated by s 5D of the *Land Regulation 1995*, may be in breach of any covenant (express or implied) to permit the lessee to quietly enjoy the leased premises or may be guilty of derogating from his or her grant.)

Related topics: Terms of a trustee lease (at [7.1270]; The nature of a trustee's leasing power (at [7.1280]); The Minister's "in principle" approval (at [7.1330]); What does the Minister approve? (at [7.1360])

Notes

1 For related content in the *Cadastral Survey Requirements*, see p 751.

2 Before the *Land and Other Legislation Amendment Act 2007*, s 63(2) required the rent to be the highest rent that could reasonably be obtained, having regard to the use and the community benefit and purpose of the trustee lease.

3 Presumably, where the building is not permitted (eg where there is no authority under a building/planning law for its construction or its construction is prohibited or has not been approved, where approval is necessary, by the Minister under the LA) the building may be used for the community purpose for which it was reserved or granted in trust without undue interruption or obstruction.

Section 61(3) of the LA clearly contemplates that there will be some interruption or obstruction. That interruption or obstruction may be "undue" where it is disproportionate to the activities that may reasonably be expected to be carried out on the trust land, having regard to the land's community purpose.

4 In that case a public authority which had granted what was described as a lease argued that it had only granted a licence. This was on the basis that the agreement included a reservation to the public of a right to enter the land for the purpose of picnics and excursions. Ostler J held that a lease had been granted. At 560 his Honour said: "In the document before me the reservation is in favour of third persons, and the reservation is expressly assented to by the lessee. This shows that the lessee was intended to have exclusive possession. If this were not so, what reason would there be for the insertion of a covenant by which he (the lessee) agrees specifically to confer limited rights upon third persons? The rights conferred on members of the public by cl 6 are not inconsistent with the enjoyment of exclusive possession on the part of the lessee. The possession of the lessee is paramount."

Compare *Georgeski v Owners Corporation SP49833 & Ors* (2004) 1 ASLLR 96 where an analogous provision in a licence granted under the *Crown Lands Act 1989* (NSW) for access by the public led to a different conclusion. However, this was because the licensee had expressly acknowledged that she was not to have a right to exclusive possession of the licensed area and s 46 of the *Crown Lands Act 1989* provided that a disposition expressed to be a licence is a licence even if it purports to confer a right to exclusive possession. According to Barrett J the form of the instrument and the language used in it were, in the particular statutory context, entirely consistent with the view that only a licence was intended.

5 The permission may be general in the sense that the trustee "throws open" the reserve to the public.

Entering into agreement for trustee lease

[7.1320] A trustee may enter into an agreement for lease which is subject to the Minister's approval being given under s 57 for the lease (*Victoria Park Golf Club Inc v Brisbane City Council* (2001) 118 LGERA 107 at [20]). However, the agreement itself cannot operate as a demise. Also, it is not specifically enforceable to the extent that it compels the trustee to confer a right to possession of the land. There will, however, be an implied term in the agreement that the trustee do all things necessary and reasonable to obtain the Minister's approval (*Dorrigo Shire Council v Smith* (1956) 3 LGRA 270 at 275; see also *Butts v O'Dwyer* (1952) 87 CLR 267; *Downward Bricklaying Pty Ltd v Goulburn-Murray Rural Water Authority* (2003) 8 VR 61). To that extent the agreement might be specifically enforceable.

A trustee may only enter into an agreement for lease where that is consistent with the trustee's functions and powers under the LA.[1]

Related topics: The Minister's "in principle" approval (at [7.1330])

Notes

1 Admittedly, however, that raises a slight difficulty. A trustee is required to manage trust land consistent with achieving the purpose of the trust for the land (s 46(1)(a) LA). In addition, a trustee may take all action necessary for the maintenance and management of the land (s 52(1) LA). That action must be consistent with:
(a) the community purpose for which the trust land was created;
(b) the LA; and
(c) any conditions of appointment (s 52(2) LA).
Even if the lease to be issued according to the agreement for lease satisfies s 59 of the LA (or, for present purposes, only s 59(2)), the agreement for lease may not always be within the contemplation of ss 46(1)(a) and 52. A trustee's powers to contract are subject to the LA.

Minister's approval

[7.1330] A trustee of trust land may lease all or part of the land if the trustee first obtains the Minister's "in principle" approval, which may include conditions, to the lease (s 57(1), (2) LA).[1] A condition of the Minister's approval may be that a stated mandatory standard terms document must form part of the lease (s 57(2) LA). Such a document includes the Minister's "standard" lease provisions that the Minister generally requires all trustee leases to include.[2] If there is conflict between a mandatory standard terms document and the terms included in the trustee lease, the mandatory standard terms document prevails (s 320A(2), (3) LA).[3]

The Minister may only approve a trustee lease if s 59 of the LA is complied with.[4] However, he or she is not bound to approve the lease if s 59 is complied with.[5] The power to approve is a discretionary one.

The Minister's approval to a trustee lease is not required where the trustee holds a general authority to lease[6] or in respect of a construction trustee lease (that is, a trustee lease in favour of the State for the construction of transport infrastructure and the provision of transport services on the lease land).[7]

Notes

1 The Minister usually states that the following condition applies to an approval of a trustee lease:
"The trustee must, within 14 days of becoming aware of any of the following occurrences, inform the Minister in writing, of any such occurrences:
1. The lessee's failure to renew the public liability insurance cover as required under the terms and conditions of the lease agreement between the lessee and the trustee ("the agreement");
2. The lessee's failure to forward to the trustee within 14 days after the commencement of a renewal period for such cover, a copy of the certificate of currency as required under the agreement;
3. Receipt by the trustee of a notice of cancellation in relation to such cover."

2 See [7.1430].
3 At the time of writing no mandatory standard terms document had been approved.
4 See [7.1500].
5 See [7.1360].
6 See [7.1390].
7 See [7.1381].

"In principle" approval

[7.1340] The Minister cannot be compelled to endorse his or her approval under s 57(4) of the LA if the lease presented for endorsement differs from the lease initially approved "in principle" by the Minister. The Minister must approve the entire lease and not simply the essential terms of it or a type of transaction. The words "in principle" do not control the word "lease" in s 57(1).

An "in principle" approval to a proposed trustee lease is likely to be given where the lease is consistent with any management plan for the trust land.[1]

On an ordinary reading the words "in principle" suggest that the Minister reserves the right to add further, or amend current, conditions to the approval and perhaps even withdraw it (see *Foote v Browne* (1977) 35 LGRA 146)). Arguably, however, in light of the drafting of s 57 of the LA, "in principle" approval might in fact be a final approval. The Minister is given an opportunity to impose conditions or to not approve the proposed lease at the time it is submitted to him or her. Subject to compliance with the conditions of the "in principle" approval and the LA, the Minister may have an implied duty to endorse the lease which, on registration, creates a trustee lease.[2] The administering department's practice is to consider the terms of a proposed trustee lease at the "in principle" approval stage and – subject to the lease, the trustee and the proposed trustee lessee complying with any conditions of that approval – an approval is endorsed on the lease thus allowing the lease to be registered. However, in *JL Holdings Pty Ltd v The State of Queensland* [1998] FCA 220, Kiefel J said, unlike the regime created by ss 343-345 of the *Land Act 1962*, s 57 of the LA suggested a regime "where the discretion to approve is retained by the Minister to the end". For this to be correct, the approval under s 57(1) and the approval under s 57(4) must be different approvals on the basis the approval under s 57(1) is an interim approval and the approval under s 57(4) is a final approval.[3]

It is suggested an "in principle" approval to leasing (as opposed to the final terms of a proposed lease) under s 57 of the LA could be useful in circumstances where a trustee such as a local government proposes to lease land but, as such an interest must be made available by competitive means under s 491 of the *Local Government Act 1993*, the parties to the lease and perhaps even the final terms cannot be ascertained at that stage. However, the local government can at least make the interest available in the knowledge that it has some Ministerial approval. When the *Local Government Act 1993* has been satisfied, the final lease may be presented for approval. Any such lease would need to be consistent with the Minister's "in principle" approval. In this way, the "in principle" approval takes on a real purpose.[4]

Notes

1 As to a management plan for trust land see [7.1060].

2 The "approval" referred to in s 57(4) of the LA seems to refer to the approval under s 57(1) and not some subsequent approval. While it might be open to the Minister to place a condition on his or her approval that qualifies the "in principle" approval to such an extent that it is, in truth, only an "in principle" approval (eg "it is a condition of the Minister's approval that the lease be submitted again for consideration" at a particular time), if it is the case the Minister's "in principle" approval under s 57(1) is in the nature of a final approval, such a course of action may circumvent the operation of the section. Section 391A of the LA does not appear to apply to s 57. Section 391A(2) says that if a document requires the Minister's approval to be registered, the Minister may tell the person seeking to register it that the approval will be given subject to conditions the Minister considers appropriate for the document. This may be called an "in principle" approval (s 391A(3) LA). When the conditions are complied with, the Minister may give the approval by executing the appropriate form (s 391A(4) LA). Section 57(4) requires the Minister's approval to be "endorsed" on the trustee lease document before the lease is registered. The Minister has already given his or her approval under s 57(1).

Note also ss 23(1) and 24AA of the *Acts Interpretation Act 1954* which provide:

23.(1) If an Act confers a function or power on a person or body, the function may be performed, or the power may be exercised, as occasion requires.

24AA. If an Act authorises or requires the making of an instrument or decision:

(a) the power includes power to amend or repeal the instrument or decision; and

(b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

3 As a matter of practice, the endorsement of approval under s 57(4) is made by the same delegate of the Minister who gives the "in principle" approval under s 57(1).

"In principle" approval issued in respect of trustee leases by the Department of Natural Resources and Water certainly does not suggest a discretion is retained in the Minister. Quite the contrary is suggested, in fact. See in this regard *Wattle Park Pty Ltd v Commissioner of Highways* (1973) 31 LGRA 435.

4 It is suggested s 57 of the LA should be amended to make it clear what is intended by an "in principle" approval. See also s 420I(b) of the LA and [5.1021].

Estoppel against Minister

[7.1350] The Minister may not bind himself or herself in advance to exercise a discretion under s 57(1) in a particular way (*Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520). Neither may an officer of the department bind the Minister. On this basis an estoppel may not arise against the Minister or the State (*Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416; *JL Holdings Pty Ltd v The State of Queensland* [1998] FCA 220). However, where all that is left to be done is to endorse a trustee lease under s 57(4), these principles do not apply unless the Minister has a discretion as to whether he or she will endorse under s 57(4) (*JL Holdings Pty Ltd v The State of Queensland* [1998] FCA 220).[1]

Notes

1 See [7.1340].

What the Minister must approve

[7.1360] The nature of s 57 of the LA is that the Minister approves a trustee leasing trust land according to an approved lease (only).

Section 59 provides that the Minister may only approve a trustee lease if the lease:

(a) would be consistent with the community purpose for which the trust land was created; and

(b) would facilitate or enhance the purpose for which the trust land was created;

or if (a) and (b) are not satisfied:

(c) would not diminish the purpose; and

(d) all further improvements built or placed by the lessee on the leased land are first approved by the Minister.

Despite some uncertainty conveyed by the words of the LA, it is suggested:

- the Minister may consider, in deciding whether to approve a trustee lease or not, the public interest and whether the terms of the proposed lease are inconsistent with the provisions of the LA;[1]
- the Minister, while effectively considering all the terms of a proposed trustee lease as presented, may not be able to refuse approval where a term does not relate to the *leasing* of the trust land or to the exercise of his or her discretion (properly determined); however, the Minister needs to consider all material and information that reasonably and sensibly relates to the lease transaction and to the exercise of his or her discretion; and
- s 59 is a "threshold" requirement which must be satisfied; any requirement to consider the public interest (by having regard to those matters set out in s 4 of the LA, where relevant) is a value judgment made having regard to the subject-matter, scope and object of the LA (including the object of ch 3, pt 1 as stated in s 30).[2]

Notes

1 If the lease is inconsistent with the LA then, irrespective of the Minister's approval, the relevant terms of the lease may be of no effect in any event.

2 See further Boge, *Annotated Land Act 1994*, at [57.61].

Approval of "trustee lease" & exercise of Minister's discretion

[7.1370] The terms of a trustee lease dictate the extent to which the trustee may and does lease the land. This is not to suggest, however, that rights and obligations that are not expressly dealt

with under the trustee lease may not be implied. Whether they are will depend on the ordinary rules of construction of leases relating to the implication of terms and whether or not they are consistent with the LA and the Minister's terms of approval. Thus, the Minister approves a "lease transaction" to the extent such a transaction is governed by the LA. That transaction generally consists of all the terms agreed by the parties that may reasonably and sensibly be considered to be part of a lease transaction and which are otherwise contemplated by the term "lease" in s 57. Some related or collateral agreements[1] may need to be disclosed to the Minister to enable him or her to properly consider and then approve (or not approve) the leasing of the trust land according to the Act (*Lang v Castle* [1924] SASR 255) (eg an incentive agreement which provides that the lessee may pay a rent that is less than the rent on the face of the lease).

Given that a trustee's leasing power under s 57 of the LA is facultative – in terms of s 57(1) the trustee *may only* lease with the Minister's approval – and the fact that the Minister's approval, at first, is only an "in principle" approval, any approval given by the Minister must be to the "material or relevant terms" of the "proposed" lease. According to Napier J in *Lang v Castle* [1924] SASR 255, the materiality or relevance of a term depends on the particular transaction itself *and* the exercise of the discretion which is to be guided by that information. In relation to the latter, it is appropriate to consider the purpose of the Act giving the Minister a discretion to approve or not approve a lease – that is, as alluded to earlier, embodied in the object of the LA (including s 30).[2]

Notes

1 It is not suggested that what is being discussed here are those contracts that strictly answer the description of "collateral contracts" as understood in contract law.

2 See further Boge, *Annotated Land Act 1994*, at [57.61].

No appeal against decision

[7.1380] A trustee or a proposed trustee lessee may not appeal against a Minister's refusal to approve a trustee lease, or against an approval on terms unsatisfactory to the trustee or the proposed lessee. However, the Minister's decision may be reviewable, in appropriate circumstances, under the *Judicial Review Act 1991.*

Related topics: The nature of a trustee's leasing power (at [7.1280]); The nature of a trustee lease (at [7.1310]); General authority to lease (at [7.1390]); Basis of Ministerial approval to a trustee lease (at [7.1500])

Construction trustee leases

[7.1381] A trustee of trust land may, without the Minister's approval, lease all or part of the trust land to the State for the construction of transport infrastructure (eg for a busway) and the provision of transport services on the lease land (s 57(2A) LA). A construction trustee lease may be granted even if its purpose is inconsistent with the purpose for which the trust land was created (s 57(2B) LA). Section 57 is not to be taken to authorise the construction of works under a construction trustee lease before the lease is registered (s 57(3A) LA).

As the construction trustee lease may be inconsistent with the purpose for which the trust land was created, the construction trustee lease provisions are intended to avoid the need to "remove" the required land from the trust land to enable the construction of transport infrastructure and the provision of transport services.

Related topics: Subleasing of a construction trustee lease (at [7.1451])

General authority to lease

[7.1390] If the Minister considers it appropriate, the Minister may give a trustee of trust land a written authority dispensing with the need to obtain the Minister's approval for trustee leases under s 57 (s 64(1) LA). A general authority may be issued, for example, where the Minister is satisfied with a management plan prepared and given pursuant to s 48 that contemplates leasing of trust land. An authority may be withdrawn by the Minister (s 64(3) LA).

A trustee lease granted under an authority must be consistent with the community purpose of the trust land and any requirements prescribed under the *Land Regulation 1995* (s 64(2) LA) (see pt 2, div 3 *Land Regulation 1995* which provides that a lease must contain certain matters, including particular conditions and an information section).

If a trustee has a general authority under s 64 of the LA there is no requirement that a trustee lessee seek the Minister's approval to the transfer, mortgaging or subleasing of the lease (s 58(1)(b) LA). However, the trustee lessee must still obtain the trustee's written approval to the transaction.

An authority may also be given under s 64 of the LA to a lessee to grant a sublease of a trustee lease and to a sublessee to grant a sub-sublease.[1]

If there is a registered mandatory standard terms document that applies generally to a trustee lease, a sublease of a trustee lease or a sub-sublease of a sublease of a trustee lease:

(a) a trustee, lessee under a trustee lease, or sublessee under a sublease of a trustee lease, as the case may be, must not lease, sublease or sub-sublease trust land unless the standard terms document forms part of the relevant lease; and

(b) the trustee lease, sublease or sub sublease, as the case may be, is of no effect if the document does not form part of the relevant lease (s 64(5) LA).

Also, if there is a registered mandatory standard terms document that applies to a stated type of relevant lease (eg a lease for a particular purpose or a lease relating to land in a particular area):

(a) a trustee, lessee or sublessee must not issue a lease, sublease or sub-sublease, as the case may be, unless the standard terms document forms part of the relevant lease; and

(b) the lease, sublease or sub-sublease, as the case may be, is of no effect if the document does not form part of the relevant lease (s 64(6) LA).

If there is conflict between a mandatory standard terms document and the terms included in the trustee lease, sublease or sub-sublease, as the case may be, the mandatory standard terms document prevails (s 320A(2), (3) LA).[2]

Related topics: Management plans (at [7.1060]); The Minister's "in principle" approval (at [7.1330]); Community purposes (at [7.210])

Notes

1 See further [7.390].

2 At the time of writing no mandatory standard terms document had been approved.

When trustee lease takes effect

[7.1400] Section 57(3) of the LA provides that a trustee lease must be registered. Section 57(4) provides that each trustee lease must be endorsed with the Minister's approval before it is registered. The LA does not say that the Minister's approval lapses after a certain time if the trustee lease is not lodged for registration (cf s 332(4) of the LA in relation to a sublease of a State lease).[1] While this suggests on its face, when considered with the requirement under sub-s (3) and ss 301 (Interest in land not transferred or created until registration) and 302 of the LA (Effect of registration on interest), that there is not a period during which an (equitable) interest arises

pending registration,[2] as s 295 (Right to have interest registered) will apply it may be said the trustee lessee has a limited equitable interest while the Minister's approval remains current.[3]

Notes

1 However, the Minister may, as a condition of his or her approval, provide that the approval will lapse if the trustee lease is not lodged in the land registry within a specified time (usually six months).

2 This is so even where it is a trustee lease of a DOGIT and is recorded in the freehold land register.

3 When the Minister approves a trustee lease, a condition of that approval will be that the lease may not commence until a date after the approval is given. It is not said that it may only commence after the lease has been registered.

However, note s 57(3A) which provides that s 57 does not authorise the construction of works under a construction trustee lease *before the lease is registered*.

Related topics: Right to have interest registered (at [25.90])

Holding over under trustee lease

[7.1410] It is the Minister's practice to not allow a covenant in a trustee lease permitting a trustee lessee to "hold over" with the trustee's consent after the expiration of a trustee lease. In any event, as any holding over creates a new lease, it would have to comply with s 57 of the LA.[1]

Related topics: The trustee lease (generally) (at [7.1270])

Notes

1 If the trustee lease is granted by a trustee under a general authority any new lease must still be registered (s 57(3) LA).

Practice – trustee lease

[7.1420] This is a general guide only.

PRACTICE – TRUSTEE LEASE

A. Relevant administering department policies

Policy PUX/901/209 – Secondary Use of Trust Land.[1]

B. Ministerial approval

Trustee lease

Ministerial approval to a trustee lease is required unless the trustee has a general authority to lease.

A trustee should submit a letter to the local (Department of Natural Resources and Water (DNRW)) office seeking "in principle" approval to the trustee lease in terms of s 57 of the LA. Currently there is no approved application form. The trustee lease that is lodged for registration will need to be endorsed with the Minister's (or a delegate's) approval.

Amendment of a trustee lease

Ministerial approval to an amendment of a trustee lease is required unless the trustee has a general authority to lease.

C. Form

Trustee lease

Form 7 Lease. A lease plan must be lodged with the lease (where the lease relates to part of the land in the reserve or part of a building on the reserve). The plan may be a sketch plan the chief executive is satisfied identifies the land being leased, or, if required by the chief executive, a plan of survey identifying the land being leased (s 286B(1)(a) LA).[2] Unless the lease is for part of the land in a deed of grant in trust and the lease is for a term of more than 10 years, it is not a reconfiguration of a lot for the *Integrated Planning Act 1997*.

Completion of Form 7 in respect of matters peculiar to State leasehold

Item 4, Interest being subleased – "Reserve *[insert number]* for *[insert community purpose]*".

Item 6, Commencement Date – must be after the date of the Minister's "in principle" approval.

Amendment of a trustee lease

Form 13 Amendment

D. Fees

As prescribed under sch 6 to the *Land Regulation 1995*.

E. Duty

Nil.[3]

F. Registration

A trustee lease and amendment must be lodged with DNRW with the Minister's approval.

Notes

1 See [7.1500], [7.1600].

2 That is, the plan format is at the discretion of the chief executive. Reference should be made to any letter referring to the approval of the lease from the administering department in this regard. Any plan of survey must comply with the *Survey and Mapping Infrastructure Act 2003* and must be certified as accurate by a cadastral surveyor within the meaning of the *Surveyors Act 2003* (s 286B(2) LA).

3 Lease duty was abolished in Queensland from 1 January 2006.

Minister's usual requirements

[7.1430] The Minister usually insists on the following provisions in a trustee lease. These requirements may, of course, change and are of general application only. It is anticipated they, or similar provisions, will be included in a mandatory standard terms document which the Minister will insist form part of all trustee leases (see s 57(2) LA). At the time of writing, a mandatory standard terms document was not available. Readers are encouraged to seek specific advices from the Department of Natural Resources and Water in relation to its requirements for a particular lease.

Generally, a trustee lease may not include any provision that is contrary to the LA. Where a matter requires the approval of the Minister under the LA the relevant provision must include a reference to the Minister's approval (eg for any transfer, mortgage or sublease the relevant provision should be to the effect that the lessee may only transfer, mortgage or sublease the lease with the approval of the lessor and the Minister administering the LA).

1. Introduction

1.1 [**Reserve**] [Details of the dedication must be included. For example, by a Reserve and Set Apart Notice published in the Government Gazette dated 1 July 2000, page 1067, the land described as Lot 1 on SP 19876 having an area of 15.05 hectares was dedicated as a Reserve for Environmental purposes (R.2678) under the control of the Brisbane City Council as Trustee.]

[Details of appointment of trustees must be included, if appropriate. For example, replacement of Trustees Notice published in the Government Gazette dated 1 July 2002, page 1890, with the new Trustee being the Gold Coast City Council (R.2678).]

1.2 (a) The Lessee has requested the Brisbane City Council to grant it a lease of the Premises upon the terms and conditions of this Lease, and the Brisbane City Council has agreed to this.

(b) The land upon which the Premises are located is a reserve under the *Land Act 1994* and has been granted in trust to the Brisbane City Council for Environmental purposes without undue interruption or obstruction.

2. Miscellaneous

2.1 The Lessee acknowledges that:

Sample Only

12

Roads

Introduction .... **[12.10]**
Key concepts .... [12.10]
Key Legislation .... [12.10]
Types of road transport corridors .... [12.11]
Public roads: creation & dealings in (other than closure) .... [12.12]
Responsibility .... [12.13]
"Road" .... **[12.20]**
Land Act 1994 .... [12.30]
Excluded land .... [12.31]
"An area of land, whether surveyed or unsurveyed" – s 93(1) .... [12.40]
Width .... [12.50]
"Dedicated, notified or declared to be a road for public use" – s 93(1)(a) .... [12.60]
"Dedicated" .... [12.70]
"Declared" .... [12.80]
"Public use" .... [12.90]
"Taken under an Act, for the purpose of a road for public use" – s 93(1)(b) .... [12.100]
Types of roads – s 93(2) .... [12.110]
Stock route .... [12.120]
As part of another public purpose area .... [12.130]
Protected area .... [12.140]
State forest & timber reserve .... [12.150]
Recreation area .... [12.160]
Coastal management district .... [12.170]
Reserve .... [12.180]
Public thoroughfare easements .... [12.181]
Common law .... **[12.190]**
Highways .... [12.200]
Exception to indefeasibility under Land Title Act 1994 .... [12.210]
Creation .... **[12.220]**
Public acceptance of dedication .... [12.221]
Determination of area .... [12.230]
Ministerial dedication under statute (general) .... [12.240]
Creation prior to Land Act 1962 .... [12.250]
Creation under Land Act 1994: Ministerial dedication .... **[12.260]**
Dedication prior to Land and Other Legislation Amendment Act 2007 .... [12.261]
In accordance with statutory provision .... [12.270]
"Dedicate" .... [12.271]
Creation through identification in public or official map .... [12.272]
"Reserve" for road purposes .... [12.280]
"Road reserve" & "reserved road" .... [12.290]
Reservation .... [12.300]
Nature .... [12.301]
Section 94(2) Land Act 1994 .... [12.310]

Use by the public as a road ... [12.311]

Creation under common law: private dedication ... [12.320]

Whether possible in Queensland ... [12.321]

Requirements ... [12.322]

Creation by lodgement or publication of map or plan ... [12.323]

Private dedication ... [12.330]

Lodging plan of subdivision: Land Title Act 1994 ... [12.340]

Land that must be dedicated as a road ... [12.341]

Identification on plan of subdivision ... [12.342]

Approval of local government ... [12.343]

Easement for right of way: extinguishment ... [12.344]

Plan of subdivision: approval under Integrated Planning Act 1997 ... [12.345]

Plan of survey: nature ... [12.350]

Consent of encumbrancees ... [12.360]

Plan of subdivision under Land Act 1994 ... [12.370]

Acceptance by the public ... [12.371]

Surrender to the State ... [12.380]

Easement providing access to a road: development approval ... [12.390]

Dedication by State lessee ... [12.400]

Dedication by trustee of reserve ... [12.410]

Ownership of land ... [12.420]

Statute ... [12.430]

Comparison with other public transport corridor land ... [12.440]

Section 3.4.4 of Integrated Planning Act 1997 ... [12.450]

Section 95 of Land Act 1994 ... [12.460]

Height & depth ... [12.461]

Parcels of land that include a road ... [12.470]

Common law ... [12.480]

Rights of owner of adjoining land ... [12.490]

State-controlled roads: restricting adjoining landowners' rights of use ... [12.500]

Access limitation strips ... [12.510]

Rights of the public ... [12.520]

Statutory limitations on right to use ... [12.530]

Destruction of trees ... [12.540]

Development on land in a road ... [12.550]

Supporting evidence ... [12.560]

Community infrastructure: Integrated Planning Act 1997 ... [12.570]

Transport Infrastructure Act 1994 & Local Government Act 1993 ... [12.580]

Busway land, busway transport infrastructure, light rail land & light rail transport infrastructure ... [12.581]

"Public thoroughfare easement" ... [12.582]

"Area of land dedicated to public use as a road" ... [12.590]

"Area opened to or used by the public" ... [12.600]

State toll road corridor land & local government tollway corridor land ... [12.601]

Transport Infrastructure Act 1994 & State-controlled roads ... [12.610]

State-controlled roads ... [12.620]

"Route" ... [12.621]

Declared roads ... [12.622]

Rail corridor land ... [12.630]

Roads and railways ... [12.640]

Light rail land .... [12.650]
As motorway .... [12.660]
Regulation .... [12.670]
As limited access road .... [12.680]
Roadside facilities .... [12.690]
Toll road .... [12.700]
Regulation .... [12.710]
Powers of chief executive .... [12.720]
Construction, maintenance & operation .... [12.730]
Relationship with & powers of local governments .... [12.740]
Management .... [12.750]
Other matters .... [12.760]
Development (including designation as community infrastructure) .... [12.770]
Liquor Act 1992 .... [12.780]

Busway land .... [12.790]
Busway transport infrastructure .... [12.791]
Busway declaration: effect .... [12.800]
Not road for some Acts .... [12.801A]
Busways & roads: common areas .... [12.801]
Integrated Planning Act 1997 .... [12.810]
Management .... [12.820]
Presumption of dedication .... [12.830]
Trespass .... [12.840]
Compensation .... [12.850]
Driving .... [12.860]
Busway service providers .... [12.861]
Declaration as light rail land .... [12.870]
Building management statements .... [12.880]

State toll road corridor land .... [12.881]
Perpetual lease to the State: Land Act 1994 .... [12.881A]
Comparison with State-controlled road that is a toll road .... [12.881B]
Application of road use (traffic) laws .... [12.881C]
On rail corridor land .... [12.882]
Building management statements .... [12.883]

Local government roads .... [12.890]
Control .... [12.900]
Reasonable extension .... [12.901]
Interference with adjoining owner's common law right of access .... [12.902]
Interest of local government .... [12.910]
Roads built by Minister: time from which Local Government Act 1993 applies .... [12.920]
Regulation of use & local laws .... [12.930]
Realignments & widening .... [12.940]
Compensation .... [12.941]
Acquisition for use as footpath .... [12.942]
Local laws under Transport Operations (Road Use Management) Act 1995 .... [12.950]
Powers to make local laws .... [12.960]
Permits .... [12.970]
Example .... [12.980]

Malls .... [12.990]
Local Government Act 1993 .... [12.1000]
Permits to occupy .... [12.1010]

Local Government (Queen Street Mall) Act 1981 & Local Government (Chinatown and the Valley Malls) Act 1984 .... [12.1020]
Permits to occupy .... [12.1030]
Road closure .... [12.1040]
Local government tollways .... [12.1041]
Declaration as local government tollway corridor land .... [12.1042]
Public utility plant .... [12.1043]
Franchising .... [12.1044]
Declaration of local government tollways .... [12.1045]
Application of road use (traffic) laws .... [12.1045A]
On rail corridor land .... [12.1046]
Building management statements .... [12.1047]
Ownership of materials in a road .... [12.1050]
Minerals .... [12.1060]
Petroleum .... [12.1070]
Forest products & quarry material .... [12.1080]
Local government works .... [12.1090]
Electricity entity's works .... [12.1100]
Gas infrastructure works .... [12.1110]
Telecommunications infrastructure .... [12.1120]
Works by Coordinator-General .... [12.1130]
Special infrastructure provisions .... [12.1140]
State-controlled roads .... [12.1150]
Busway land .... [12.1160]
Resumption of land for road purposes .... [12.1170]
Fencing between land and road .... [12.1180]
Local law requirements .... [12.1190]
State-controlled roads .... [12.1200]
Interests in road .... [12.1210]
Permits .... [12.1220]
Other interests – road licences .... [12.1230]
Clarifying status of road .... [12.1240]
Relevant doubt .... [12.1241]
Road crossing river or rail corridor or raised above land .... [12.1250]
Advertising on & structures over roads .... [12.1260]
Advertising .... [12.1270]
Structures (excluding malls) .... [12.1280]
Local government control .... [12.1290]
Acquisition of footpath by local government .... [12.1291]
Closing roads .... [12.1300]
Type that may be closed .... [12.1301]
Declaration as light rail land .... [12.1310]
Temporary vs permanent road closure .... [12.1320]
Effect of closure on public & distinction between "dedication" and "opening" .... [12.1321]
"Open" but not "dedicated" .... [12.1322]
Road not needed .... [12.1330]
Consideration of uses other than public use of road .... [12.1331]
"Inquiry and notice" – s 98(1) Land Act 1994 .... [12.1340]
Procedures for road closure .... [12.1350]
Application to close road .... [12.1360]

"Adjoining owner" ... [12.1370]
Public notice & appropriate enquiries ... [12.1380]
When public notice not required ... [12.1381]
Considering objections ... [12.1382]
Interests of other parties ... [12.1390]
Closure by plan of subdivision or gazette notice ... [12.1391]
Dealing with permanently closed road ... [12.1400]
Amalgamation with freehold land ... [12.1410]
Special considerations where road closed in strata ... [12.1420]
Simultaneous opening & closure ... [12.1430]
Planning controls on permanent road closures ... [12.1440]
Transitional planning schemes (Integrated Planning Act 1997) & zoning ... [12.1450]
Status of temporarily closed road ... [12.1460]
Reopening ... [12.1470]
Closure in local government area ... [12.1480]
Limited closure ... [12.1490]
Closure under Local Government Act 1936 (repealed) ... [12.1491]
State Development and Public Works Organisation Act 1971 ... [12.1500]
Department of Natural Resources & Water Road Closure Manual ... [12.1510]
General guide ... [12.1511]
Road licences ... [12.1520]
Issuing by local government ... [12.1530]
Conditions ... [12.1540]
Nature of road licences ... [12.1550]
Improvements ... [12.1560]
Dealings in a road licence ... [12.1570]
Transfer ... [12.1580]
Surrender ... [12.1590]
Cancellation ... [12.1600]
Action where rent is not paid on time ... [12.1610]
Miscellaneous matters ... [12.1620]
Transfer duty on transfer of road licence ... [12.1630]
Roads & native title ... [12.1640]
Common law ... [12.1650]
Native Title Acts ... [12.1660]
"Road" as "public work" ... [12.1670]
Past, intermediate period & previous exclusive possession acts ... [12.1680]
Future act ... [12.1690]
Pipeline construction ... [12.1710]
Construction of road for supply of cane ... [12.1720]
Delegation of Minister's powers ... [12.1730]
Trespass ... [12.1740]
Easements ... [12.1750]

Introduction

[12.10] The operation of an efficient and sustainable road network within Queensland is of economic and social importance. Given the decentralised nature of a significant portion of Queensland's population and economic activity, road maintenance and funding is a fundamental priority for the State and policies relating to roads form part of wider transport infrastructure strategies and objectives.

Although public roads clearly have a modern-day importance – while allowing the public free passage over areas of land, they have conveniently also become corridors for the supply of public utility and other services and provide access to parcels of land – their existence, including at law, is of significant heritage. Under the common law a road is a type of highway, that is, an area of land over which the public may pass and repass as of right. For obvious reasons that public right is one that is not lightly interfered with. Today, the creation of roads is heavily regulated by statute – this is necessary to ensure there is a planned and coordinated approach to the provision of transport infrastructure.

The identification of an area of land as a "road" is significant for many purposes, including, for example, the identification of the rights already stated in the public to pass over the land; the restriction on or prohibition of the carrying on of certain activities on such land (eg, under the *Transport Operations (Road Use Management) Act 1995*);[1] the liability of public authorities for failing to carry out a function in relation to a road (or highway) (see *Brodie v Singleton Shire Council; Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, however, see now the *Civil Liability Act 2003*);[2] the prohibition on the consumption of liquor in a public place that is a road (see s 173B(1)(a)(i) *Liquor Act 1992*);[3] or holding a peaceful assembly in a public place, which includes a road (ss 4, 5 *Peaceful Assembly Act 1992*).

The meaning of "road" may vary from Act to Act[4] – definition of "road" under an Act will largely turn on the purpose of the legislation and its reason for dealing with an area of land known as a road. For example, the LA, in part, deals with the creation of roads and their closure – that is, the Act deals with the land in the road. In contrast, the LGA and TIA mostly deal with the control and management of roads. Accordingly, the definition of "road" under each Act, while sharing many similarities, varies to suit the different purposes of each Act.[5]

Notes

1 This chapter is not concerned with such matters.

2 Section 37 of the *Civil Liability Act 2003* provides –

(1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority –

(a) to repair a road or to keep a road in repair; or

(b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair.

(2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.

(3) In this section –

"road" see the *Transport Operations (Road Use Management) Act 1995*, schedule 4;

"road authority" means the entity responsible for carrying out any road work.

3 See also s 173C.

4 See further below. A road under the LA is not the same as a road under the LGA or the TIA.

5 As to the financing of roads see *Halsbury's Laws of Australia* at [225-1425]-[225-1435].

Key concepts

Key concepts in this chapter are summarised below.

- *Road as a legal concept*: The concept of a public road has important legal implications. Under the common law, a road is a type of highway over which the public may pass and

repass. Similarly, under statute a road is generally an area that is dedicated to public use. However, the precise meaning of "road" will always turn on the context in which it is used.

- *Road may be created under statute by the State or a private landowner*: In Queensland, a road may be created by Ministerial dedication under the *Land Act 1994* or, in certain cases, by the registered owner of a freehold lot.
- *Road may be closed where it is no longer needed*: A road may be closed to the public where it is no longer needed as a road.
- *Control of roads*: Responsibility for the management and control of a road rests with public authorities. Local governments control local government roads. The State (through the Department of Main Roads) controls State-controlled roads.

Key Legislation

Key legislation regarding the topic of this chapter is set out below.

- *Land Act 1994* **(LA)**
- *Transport Infrastructure Act 1994* **(TIA)**
- *Local Government Act 1993* **(LGA)**
- *Transport Operations (Road Use Management) Act 1995*
- *Land Title Act 1994*
- *Integrated Planning Act 1997*
- *Local Government (Queen Street Mall) Act 1981*
- *Local Government (Chinatown and the Valley Malls) Act 1984*
- *State Development and Public Works Organisation Act 1971*

Types of road transport corridors

[12.11] Land may be located in various types of road transport corridors in Queensland. These are explained in the following table.

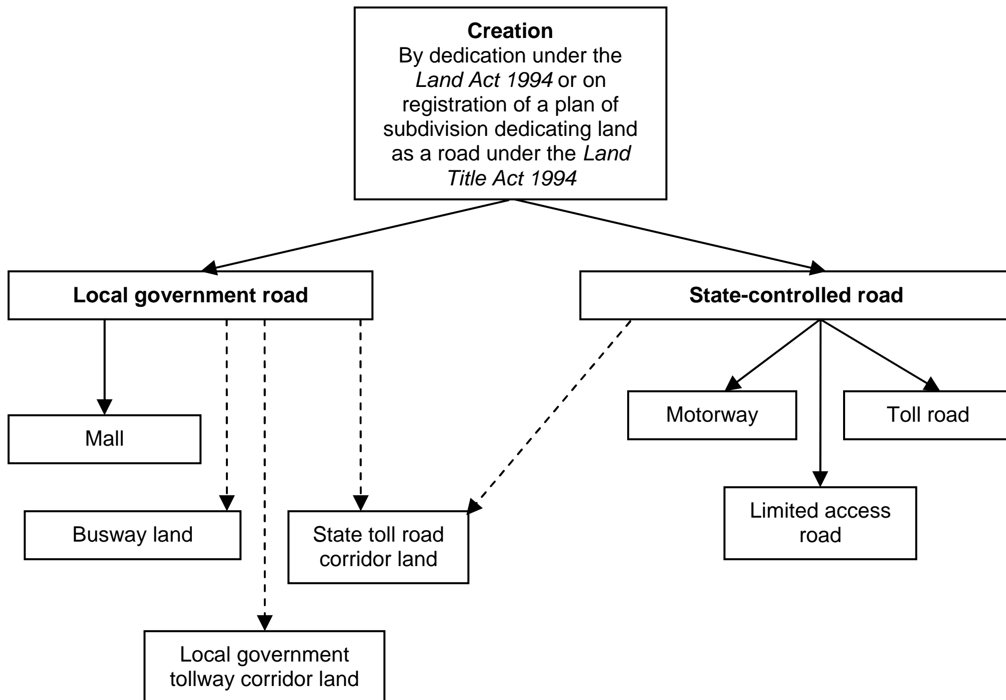
Type of road transport corridor	Relevant Act(s)	Tenure arrangements	Paragraphs
Local government road	*Land Act 1994* (creation of public road)* *Local Government Act 1993*	Land in a public road is vested in the State (s 94 *Land Act 1994*) Control of the road lies with the relevant local government (s 901 *Local Government Act 1993*) A mall may be established in a road (*Local Government Act 1993*)	[12.890]-[12.1040]

Type of road transport corridor	Relevant Act(s)	Tenure arrangements	Paragraphs
State-controlled road	*Land Act 1994* (creation of public road)* *Transport Infrastructure Act 1994*	Land in a public road is vested in the State (s 94 *Land Act 1994*) A State-controlled road may be declared to be a motorway, limited access road or toll road (*Transport Infrastructure Act 1994*)	[12.620]-[12.780]
Busway land	*Transport Infrastructure Act 1994* *Land Act 1994*	Perpetual lease in favour of the State under the *Land Act 1994* (s 17(2))	[12.790]-[12.880]
State toll road corridor land	*Transport Infrastructure Act 1994* *Land Act 1994*	Perpetual lease in favour of the State under the *Land Act 1994* (s 17(2)). The land may be subleased to another person.	[12.881]-[12.883]
Local government tollway corridor land	*Transport Infrastructure Act 1994* *Land Act 1994*	Perpetual lease in favour of the State under the *Land Act 1994* (s 17(2)). The land is subleased to a local government and may be sub subleased to another person.	[12.1041]-[12.1047]

* Local government and State-controlled roads are not limited to public roads created under the *Land Act 1994*.

Public roads: creation & dealings in (other than closure)

[12.12] The creation of and dealings in a public road may be explained by the following.[1] A dashed line indicates that the land no longer remains a road. Land in busway land, State toll road corridor land and local government tollway corridor land is leased in perpetuity to the State under the LA.



Notes
1 A road (including a State-controlled road) may be closed, permanently or temporarily, under the LA – see [12.1300]-[12.1510].

Responsibility

[12.13] Most roads are controlled by local governments under the LGA. However, State-controlled roads (main roads) are controlled by the State, through the Department of Main Roads, under the TIA. The land in roads remains under the LA and is administered by the Department of Natural Resources and Water.

"Road"

QUICK SUMMARY

The precise meaning of "road" will depend on the context in which it is used. Strictly speaking, "road" is more of a statutory term **[12.20]**.

Roads under the *Land Act 1994*

A road under the LA is an area of land, whether surveyed or unsurveyed:
(a) dedicated, notified or declared to be a road for public use; or
(b) taken under an Act, for the purpose of a road for public use (s 93(1) LA).
The term includes:
(a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route;
(b) a bridge, causeway, culvert or other works in, on, over or under a road; and
(c) any part of a road (s 93(2) LA).

Land in a road under the LA is not unallocated State land **[12.30]-[12.120]**.

A road may be included in another public purpose area under an Act **[12.130]-[12.180]**.

Roads under the common law

There is no settled meaning of "road" at common law. It is usually interpreted widely to include streets, roads, lanes, bridges, thoroughfares or places open to or used by the public for the passage of vehicles **[12.190]**.

At common law a highway is a way over which every member of the public has a right to pass and repass at all times. A road is a type of highway. Roads are characterised as footways, bridleways and cartways or carriageways. It is the public's right to pass and repass over land that creates a road **[12.200]**. Whether a road is an exception to a registered proprietor's indefeasible title under the *Land Title Act 1994* depends on whether a common law dedication is still possible in Queensland and, if so, whether the public interest in a road supersedes the system of title by registration **[12.210]**.

[12.20] The precise meaning of "road" will depend on the context in which it is used (*Re Warumungu Land Claim; ex parte Attorney-General (Northern Territory)* (1987) 77 ALR 27 at 33 per Beaumont J). "Road" is often considered to be more of a statutory term and its meaning will turn on the Act under consideration. Under the common law, one generally refers to a "highway". However, that term is almost always wider than "road" under an Act and case authorities dealing with highways cannot always be taken to apply to roads under a statute.

Related topics: Roads under the *Land Act 1994* (at [12.30]); A road as a highway at common law (at [12.200]); Roads under the *Transport Infrastructure Act 1994* and *Local Government Act 1993* (at [12.580])

Land Act 1994

[12.30] A "road" under the LA is an area of land, whether surveyed or unsurveyed:

(a) dedicated, notified or declared to be a road for public use; or

(b) taken under an Act, for the purpose of a road for public use (s 93(1) LA).

The road is thus a public road.

The term “road” under the LA includes:

(a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route;[1]

(b) a bridge, causeway, culvert or other works in, on, over or under a road; and

(c) any part of a road (s 93(2) LA).

Land in a road under the LA is not unallocated State land (sch 6 LA definition of “unallocated State land”).

Cautionary note: A road under the LA is not necessarily the same as a road under another Act (eg, the TIA or the LGA). See [12.580].

Excluded land

[12.31] Land that is busway land,[2] State toll road corridor land[3] or local government tollway corridor land[4] under the TIA is leased to the State in perpetuity under the LA. Although the land may have been a road under the LA at one point, immediately before such land becomes busway land, State toll road corridor land or local government tollway corridor land it ceases to be a road under the LA. This follows from the fact that, for present purposes, a lease may only be granted under the LA in respect of unallocated State land. Further, having regard to the uses of these areas of land (including the commercial arrangements put in place for operators in some cases), it is not appropriate they merely remain as roads.

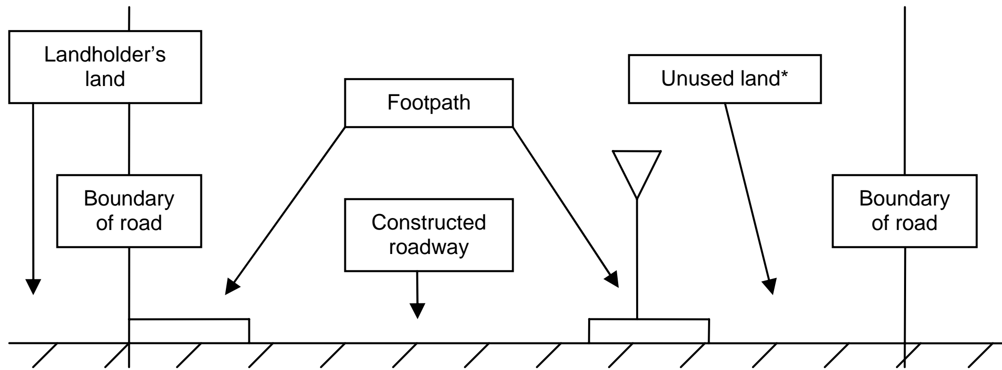
Related topics: An area of land, whether surveyed or unsurveyed (at [12.40]); Taken under an Act, for the purpose of a road for public use (at [12.100]); Unallocated State land (at [3.90])

“An area of land, whether surveyed or unsurveyed” – s 93(1)

[12.40] “Land” is not defined in the LA.[5] However, it is clear “land” is not confined to the surface of the land. Thus, a road may be created in respect of airspace above or soil beneath the surface of the land. For example, an area of land that is in a road may be an overpass or a tunnel. Ordinarily the area of land in a road includes all the airspace above the surface of the land in a road and all the soil beneath the surface. However, the land in a road may be restricted in terms of its area. For example, land that is in a tunnel that is also a road might only be a road in respect of the land that is contained in the tunnel. In other words, the land above the tunnel is not part of the road and may be used for other purposes. According to the Explanatory Notes to the *Land Bill 1994* (at page 1065), “the term “road” refers not only to the formed or bitumen surface, but to the entire strip or parcel of land which has been dedicated as road”[6] (as shown in **Figure 1**).

In Queensland a road may be surveyed or unsurveyed. Land that is a road which is situated in remote areas of the State or was created by a common law dedication might be unsurveyed.

Figure 1 – Road



* This unused land is sometimes referred to as a "road reserve". It is part of the dedicated road.

> **General note – Extent of dedication relevant to closure of road:** Where a road is to be closed, the closure relates to the actual land in the road dedicated as a road, not merely the part of the dedicated land used as a roadway or footpath. See [12.1300]).
>
> **General note – Where ingress/egress to an adjoining property to be by way of a tunnel or structure:** If a local government requires ingress/egress to a property adjoining a road to be by way of a tunnel under the constructed roadway or a structure in the air space above the roadway (or footpath) and the tunnel or structure is not enclosed in any way with the adjoining property, the tunnel or structure is treated as another level of road formation (Department of Natural Resources and Water, SLAM Policy PUX/901/237).

Width

[12.50] There is no minimum or maximum width for a road. The usual width is 20 metres. (Prior to metrication the normal width of a road was 22 yards (1 chain)).[7]

> **Related topics:** Road reserve (at [12.290]); The height and depth of land in a road (at [12.461])

Notes

1. While a stock route may be a road, a road is not necessarily a stock route. A stock route may be created in respect of a road. See the *Land Protection (Pest and Stock Route Management) Act 2002* and ch 13.
2. See [12.790].
3. See [12.881].
4. See [12.1041].
5. Section 36 of the *Acts Interpretation Act 1954* defines "land" as including messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land. In light of its inclusive nature, this definition is not very helpful for present purposes.
   For related content in the *Cadastral Survey Requirements*, see p 751.
6. See also Department of Lands, "White Paper – Crown Land Management Reform in Queensland" December 1992 at paragraph B5.
7. See, however, [3.170] for certain State-controlled roads.

[Next page is 4,533]

"Dedicated, notified or declared to be a road for public use" – s 93(1)(a)

[12.60] Section 93(1)(a) of the LA is not limited to the creation of a road under that Act,[1] or under statute in general. A road (or, more precisely, a highway) may be created by the owner of land under the common law.[2]

Any dedication, notification or declaration of the area of land as a "road for public use" will, unless there is an added requirement specified by statute, create the road. Nothing further needs to be done (see, eg, s 94(2) of the LA).[3] Unlike the common law, there is no need where a dedication is made under statute for the public to accept the dedication (*Bass Coast Shire Council v King* [1997] 2 VR 5; *Permanent Trustee Co of NSW Ltd v Campbelltown Municipality Council* (1960) 105 CLR 401).

Whether a road under the LA is a road under another Act, for example, the TIA or the LGA, depends on the provisions of the Act concerned. Under the TIA and the LGA, a road includes an area of land dedicated as a road as well as an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles (sch 6 TIA; sch LGA). Land that is dedicated as a road is, therefore, a road under the LA, TIA and the LGA. However, land that is merely opened to or used by the public (and is developed for, or has as one of its main uses, the driving or riding of motor vehicles) might not be a road under the LA.[4]

> **Key point – The real issue as to whether an area of land is a road:** Land is a road because a dedication (notification or declaration) effectively places no limitation on the persons who can use the land for passage (*Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151) – it is open to everyone. This is important. Even though a statute may ultimately restrict the public's use of the road (eg by authorising a public authority to close the road to traffic), the act of creating the road – the dedication – does not place any restrictions on the use of the land by the public. Accordingly, the actual use of the land by the public (whether that is non-existent or restricted by another statute) does not alter the land's status as a road. A road may only cease to be a road if a statute says so. It does not cease to be a road because it falls into disuse. Also, it does not cease to be a road merely because a public authority takes action to prevent public access to the road.

"Dedicated"

[12.70] Under s 94(1) of the LA, the Minister may dedicate unallocated State land as a road for public use-[5] that is, he or she may create a public road.

Under the *Land Title Act 1994* a plan of subdivision of a freehold lot must distinctly show all roads that are to be dedicated to public use (s 50(a) *Land Title Act 1994*). The registration of the plan operates, without anything further, to open the road for the LA (s 51(2) *Land Title Act 1994*). Similarly, under the LA, on the coming into effect of a plan of subdivision that dedicates land as a road, the land is open as a road (s 290JA(3) LA)..

An area of land may be deemed to have been dedicated as a road under an Act (eg under s 39(4) of the *Local Government (Aboriginal Lands) Act 1978*).

Under the common law, a registered owner of (freehold) land may, by an act of dedication and an intention to dedicate the relevant land as a road (highway) and acceptance of the dedication by the public, create a road.[6] However, the dedication (of part of a lot) amounts to a reconfiguration of a lot for which a development permit under the *Integrated Planning Act 1997* will be required.

"Declared"

[12.80] Under s 96(1) of the LA, if a road is shown on an existing State lease or an existing lease mentions a plan and the plan shows a road is excluded from the lease, the road is taken to have been always dedicated as a road and open for public use. According to s 96(3), if a better

description of the location of a road becomes available, the Minister, by gazette notice, may declare the location of the road is amended by the description stated in the notice.

An area of land may be declared to be a road under another Act (see, eg, ss 7(3) and 9(4) *Queensland International Tourist Centre Agreement Act Repeal Act 1989*).

"Public use"

[12.90] "Public use" contemplates a prima facie unrestricted right of a member of the public to pass and repass over the land dedicated as a road whether on foot, by vehicle or by other means. Under the common law there may be a limited dedication of land as a road. A dedication or other form of allocation under statute may be limited if the statute so authorises. A limitation on a dedication or other form of allocation is not the same, however, as control of a road under a statute (eg under the TIA and the LGA). (Land may be in a road even if the road is closed in certain circumstances- see s 106 of the LA where a road may be temporarily closed to public use but nevertheless remains dedicated). The mode of enjoyment of the right of passage, which is a public right (*Moore v MacMillan* unreported, New Zealand Supreme Court, 16 March 1977), must accord with the fitness and nature of the road (eg a vehicle cannot be driven over a footpath) (*Nickells v Melbourne Corporation* (1938) 59 CLR 219 at 225 per Dixon J).[7] It follows the reference to "public use" is not a reference to any use of the road by the public. Rather, s 93(1)(a) of the LA refers to an area of land dedicated, notified or declared to be a road for public use. The land is a road because the dedication or other form of allocation effectively places no limitation on the persons who can use the land for passage (*Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151('*Fourmile*')).

Section 93(1)(a) of the LA refers to the dedication, notification or declaration of land for public use. It does not require that the land actually be used by the public nor can the public alter the status of a road by using the road in a manner contrary to its purpose as a road. Section 93(1)(a) refers to an intended use; it does not refer to the actual use of the land. It follows that land may still be a road under the LA if it falls into disuse as a road (unless, of course, its status has been altered because the road has been closed) or passage over the land by the public is difficult. The fact that no roadway is ever constructed on the land does not prevent the land from continuing to have the status of a road under the LA (or at law in general) (*Fourmile*). Also, the land does not lose its character as a road because some people by loitering and dalliance on occasions obstruct the road (*Permanent Trustee Co of NSW v Campbelltown Municipality Council* (1960) 105 CLR 401).

Notes

1 Or a previous *Land Act*. See, eg, s 59 *Sanctuary Cove Resort Act 1985*; s 95 *Integrated Resort Development Act 1987*; s 152 *Mixed Use Development Act 1993*.
2 See further [12.320].
3 See [12.260].
4 If it has been dedicated to be a road for public use, it need not be developed for, or have as one of its main uses, the driving or riding of motor vehicles.
5 See [12.260] and [12.310]. As to the meaning of "dedicate" see further [12.271].
6 See [12.320].
7 See further [12.520].

"Taken under an Act, for the purpose of a road for public use" – s 93(1)(b)

[12.100] Section 93(1)(b) of the LA provides that, for the purposes of that Act, a road includes land taken under an Act for the purpose of a road for public use. In *MA Gordon v The Crown* (1975) 2 QLCR 277, the Land Court held that where land had been taken under a road reservation, the land in the road was not a road until it was dedicated as such.[1] However, the land in the road is not unallocated State land under the LA (sch 6 LA definition of "unallocated State land").

The State or a constructing authority may take land subject to an estate in fee simple for road purposes pursuant to the *Acquisition of Land Act 1967*, or land the subject of a lease for road purposes pursuant to the LA. However, there is no requirement that once land is taken that it must then be used for the purpose of a road. The State or constructing authority must arrange for the land to be dedicated as a road.

Practice note – Where taken land is not used: If, within seven years of being taken under the *Acquisition of Land Act 1967*, land is no longer required by the constructing authority, the constructing authority must offer the land for sale to the former owner at a price determined by the chief executive of the department that administers the *Valuation of Land Act 1944* (s 41(1) *Acquisition of Land Act 1967*). The offer lapses 28 days after it is made (s 41(1A) *Acquisition of Land Act 1967*).

Related topics: Compulsory acquisition of land (ch 29); Resumption of land for road purposes (at [12.1170])

Notes

1 The definition of "road" in s 5 of the *Land Act 1962* was almost identical to the definition in s 93 of the LA.

Types of roads – s 93(2)

[12.110] Section 93(2) of the LA provides that a "road" under s 93(1) includes a "road" by another name. Section 93(2) does not expand the definition of "road" in sub-s (1). However, sub-s (2) is not exhaustive. Rather, it merely explains that an area of land that satisfies sub-s (1) may be described as, for example, a street or esplanade. The "public use" element demanded by sub-s (1) must be satisfied (however, the road may, at times, be closed to the public) – see generally *Permanent Trustee Co of NSW v Campbelltown Municipality Council* (1960) 105 CLR 401.

Stock route

[12.120] A road may be a stock route under the *Land Protection (Pest and Stock Route Management) Act 2002*. However, not all stock routes are roads.

Practice note – Nature of a stock route: Under the *Land Protection (Pest and Stock Route Management) Act 2002* a stock route is a road or route ordinarily used for travelling stock or declared under a regulation to be a stock route (sch 3). See [13.20].

Related topics: Stock routes (ch 13)

As part of another public purpose area

[12.130] Land in a road may be included in another public purpose area under an Act.

Protected area

[12.140] Land in a road is "State land" under the *Nature Conservation Act 1992* and may, therefore, strictly be dedicated as a protected area (State land) under the Act. However, where the land is actually being used as a road such a dedication is unlikely. For land in a protected area (State land)[1] to become a road, the dedication of the relevant land as a protected area must be revoked and then a dedication under s 94(1) of the LA must take place.